



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION

FOP/169318

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**PRELIMINARY RECITALS**

Pursuant to a petition filed October 09, 2015, under Wis. Admin. Code §HA 3.03, to review a decision by the Wood County Human Services - WI Rapids in regard to FoodShare benefits (FS), a telephonic hearing was held on November 04, 2015, at [REDACTED], Wisconsin.

The issue for determination is whether the county agency is correctly and timely pursuing recovery of a total FoodShare (FS) overpayment of \$4,365 from petitioner from the period of November 1, 2011 through November 30, 2014, due to non-client error and not client error.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: [REDACTED], ESS

Wood County Human Services - WI Rapids  
220 Third Avenue South  
Suite 4  
[REDACTED], WI 54495

**ADMINISTRATIVE LAW JUDGE:**

Gary M. Wolkstein  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. Petitioner (CARES # [REDACTED]) is a resident of Wood County who resides in a household of one.
2. The petitioner has received FoodShare (FS) benefits for a household of one since June, 2011.

3. The petitioner timely and correctly reported both his self-employment income as the owner of a welding shop [REDACTED], and his earned income as an [REDACTED] for the City of [REDACTED] during the period of his June, 2011 FS application.
4. The county agency sent a July 19, 2011 notice to the petitioner which confirmed both the petitioner's self-employment income and earned income.
5. The petitioner timely submitted his tax returns to the county agency when requested or when changes in his circumstances required such verification. Those tax returned accurately reported both his earned income and self-employment income.
6. During the process of the agency processing his six month report form (SMRF) on about November 23, 2011, due entirely to agency error, some agency worker incorrectly **deleted** the petitioner's earned income as an [REDACTED] for the City of [REDACTED] and only budgeted petitioner's self-employment income.
7. The county agency's discovery or "date of awareness" of the agency error creating the petitioner's FS overpayment was more than three **(3) years** after November 23, 2011, on **January 14, 2015**.
8. The county agency delayed nine months from January 14, 2015 until September 18, 2015 to send any FS overpayment notice to the petitioner.
9. The county agency sent the following four September 18, 2015 FoodShare (FS) overpayment notices to the petitioner for the following periods: a) November 1, 2011 to May 31, 2012 - \$813.00; b) June 25, 2012 to May 31, 2013 - \$2,107.00; c) June 1, 2013 to November 30, 2013 - \$597.00; and d) December 1, 2013 to November 30, 2014 - \$848.00. Each of those notices indicated the overpayment was "**due to non-client error**" resulting from the agency's failure to budget petitioner's earned income during that overpayment period.
10. The petitioner filed an October 9, 2015 appeal with the Division of Hearings and Appeals (DHA) regarding those FS overpayments.

### **DISCUSSION**

The federal regulation concerning FS overpayments requires the State agency to take action to establish a claim against any household that received an overissuance of FS due to an intentional program violation, an inadvertent household error (also known as a "client error"), or an agency error (also known as a "non-client error"). 7 C.F.R. § 273.18(b), see also, *FoodShare Wisconsin Handbook*, Appendix 7.3.2. Generally speaking, whose "fault" caused the overpayment is not at issue if the overpayment occurred within the 12 months prior to discovery by the agency. See, 7 C.F.R. § 273.18(b); see also, *FoodShare Wisconsin Handbook*, App. 7.3.1.9. However, **overpayments due to "agency error" may only be recovered for up to 12 months prior to discovery**. (Emphasis added). *FoodShare Wisconsin Handbook*, 7.3.2.1. Overpayments due to "client error" may be recovered for up to six years after discovery. *Id.*

In a fair hearing concerning the correctness of an overpayment of benefits, including the Food Share program, the burden of proof is on the agency. The agency must demonstrate a prima facie case establishing by the preponderance of the evidence that the overpayment occurred as determined, and must be recovered. The petitioner must then rebut the county agency's case and establish facts sufficient to overcome the county agency's evidence of correct action. The single most important evidence to do so is the Notification of FS Overissuance and the Worksheets that demonstrate how the overpayment was computed.

As decided in prior cases before the Division of Hearings and Appeals, "discovery" was not the date of referral of a likely overpayment for investigation; discovery is the date when the agency actually determines an overpayment of a fixed amount occurred, and sends a notice to the FS recipient. Overpayments due to client error may be recovered for up to 6 years prior to discovery.

However, a BPS/DFS Operations Memo No. 12-20 (effective 4-4-2012), indicates that the "discovery" date is not the date of the agency's FS Overpayment Notice, but instead the "the date that the ESS [agency] became **aware** of the potential that an overissuance may exist." In this case, based upon the best available reliable, non-hearsay evidence or testimony during the November 4, 2015 hearing, the county agency became "aware" of a potential for an overissuance on January 14, 2015.

During the November 4, 2015 hearing, the county agency representative attempted unconvincingly to shift the burden of proof to the petitioner for not "catching" the agency's error in the notices sent to him. However, the petitioner testified convincingly that he did not read the notices sent to him, and did not discover the agency's error in not budgeting his earned income. In fact, the county agency acknowledged in all four of its own September 18, 2015 FS overpayment notices that the overpayment was due to "non-client error." See Finding of Fact #9 above. There is no evidence in the record that petitioner failed to provide accurate and timely income verification to the county agency.

Based upon this January 14, 2015 awareness date regarding the overpayment period of November 1, 2011 to November 30, 2014, the county agency may not recover the non-client error overpayment for the period of November 1, 2011 to January 14, 2014 because that portion of the total overpayment period was more than 12 months prior to the discovery date of January 14, 2015. Moreover, the county agency did not pursue the alleged FS overpayment period of November 1, 2011 through November 30, 2014 until 9 months after the January 14, 2014 "awareness" date by sending to the petitioner the agency's four September 18, 2015 FS overpayment notices. Accordingly, based upon the above, I conclude the following: a) the county agency is incorrectly and untimely pursuing recovery of a non-client FoodShare (FS) overpayment against the petitioner from the period of November 1, 2011 to January 14, 2014 because that period was more than 12 months prior to the January 14, 2015 "awareness" date per FoodShare Wisconsin Handbook, 7.3.2.1; and b) the agency is correctly seeking to recover the non-client error overpayment which is solely within the 12 month period of January 14, 2014 to November 30, 2014.

### **CONCLUSIONS OF LAW**

1. The county agency is incorrectly and untimely pursuing a recovery of FoodShare (FS) overpayment for the period of November 1, 2011 to January 14, 2014 from petitioner due to non-client error because that FS overpayment is more than 12 months prior to the "awareness" date of January 14, 2015, and is thus not recoverable as an overpayment pursuant to the FoodShare Wisconsin Handbook, 7.3.2.1.
2. The Department is correctly seeking recovery of a FoodShare (FS) overpayment solely for the period of January 14, 2014 through November 30, 2014 from petitioner due to non-client error because that FS overpayment is within the 12 month period prior to the January 14, 2015 "awareness" date, and is thus recoverable as an overpayment pursuant to the FoodShare Wisconsin Handbook, 7.3.2.1.

**THEREFORE, it is**

**ORDERED**

The matter is remanded to the county agency with instructions to perform the following: a) re-calculate the petitioner's FS overpayment solely for the period of January 14, 2014 through November 30, 2014 and pursue that limited FS overpayment against petitioner solely for that period; and b) take the necessary administrative action to rescind the petitioner's FS overpayment for the period of November 1, 2011 to January 14, 2014, within 10 days of the date of this Decision.

**REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 27th day of November, 2015

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\sGary M. Wolkstein  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 27, 2015.

Wood County Human Services - WI Rapids  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability